IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

THE ESTATE OF AMOS MATTHEW FRERICHS,	)	
Plaintiff,	)	No. 3:16-cv-693
v.	)	
KNOX COUNTY, TENNESSEE, et al.,	)	
Defendants,	)	
STATE OF TENNESSEE,	)	
Intervenor.	)	

STATE OF TENNESSEE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

Count One of Plaintiff's Complaint challenges the constitutionality of Tenn. Code Ann. § 29-20-113. Having intervened for the limited purpose of defending the constitutionality of the statute, the State of Tennessee files this memorandum of law in support of its motion to dismiss Count One of the Complaint for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on the grounds of mootness, ripeness, and lack of standing.

FACTUAL BACKGROUND

Plaintiff asserts claims under state and federal law against Knox County, the Knox County Sheriff (in his official capacity) and Knox County Deputy Evan Rogers for the death of Amos Matthew Frerichs (the "underlying claims"). Frerichs's mother, Beverly Dunn, brings this action as the personal representative of his estate. The underlying federal claims allege that Frerichs was deprived of rights secured to him by the Fourth and Fourteenth Amendments, giving rise to liability under 42 U.S.C. § 1983. (Complaint at ¶¶ 96-116, 138.) The underlying state-law claims are for wrongful death under Tenn. Code Ann. §§ 29-20-101 and 8-8-302, and assault and battery under Tenn. Code Ann. § 8-8-302. (Complaint at ¶¶ 117-137.)

Count One of the Complaint seeks a declaratory judgment that Tenn. Code Ann. § 29-20-113, enacted in 2016, is unconstitutional. (*Id.* at ¶¶ 17-34.) The statute provides that a court "shall award reasonable attorneys' fees and costs" to an employee of the state or other "governmental entity of the state" who is the "prevailing party" in a claim brought against him in his individual capacity. Tenn. Code Ann. § 29-20-113(a). The statute makes provision for the payment of such attorneys' fees and costs to the governmental entity if it represents, or retains counsel to represent, the employee sued in an individual capacity. *Id.* § 29-20-113(d). Plaintiff alleges that the statute violates the Supremacy Clause and the Equal Protection Clause of the federal Constitution. (*Id*. at ¶¶ 14-15, 17-34.)

Defendants have moved to dismiss the Complaint. In their motions, Defendants have asserted, among other things, that because the Plaintiff Estate is insolvent, "Defendant Rogers and Knox County have no intention of seeking any award of attorneys' fees pursuant to Tenn. Code Ann. § 29-20-113.(2016)." (Doc. No. 12, at 3; *see* Doc. No. 13, at 1.)

ARGUMENT

"A Rule 12(b)(1) motion can either attack the claim of jurisdiction on its face, in which case all allegations of the plaintiff must be considered as true, or it can attack the factual basis for jurisdiction, in which case the trial court must weigh the evidence and the plaintiff bears the burden of proving that jurisdiction exists." *DLX, Inc. v. Kentucky,* 381 F.3d 511, 516 (6th Cir. 2004) (citations omitted); *accord RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134–35 (6th Cir. 1996); *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). The Sixth Circuit has explained the process for a district court considering a factual attack, such as the one mounted by the State of Tennessee in this case:

> [W]hen a court reviews a complaint under a factual attack, as here, no presumptive truthfulness applies to the factual allegations. Such a factual attack on subject matter jurisdiction commonly has been referred to as a "speaking motion." *See generally* C. Wright & A. Miller, Federal Practice and Procedure § 1364, at 662–64 (West 1969). When facts presented to the district court give rise to a factual controversy, the district court must therefore weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist. In reviewing these speaking motions, a trial court has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts.

Ohio Nat. Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990) (some citations omitted).

I. The Declaratory-Judgment Claims are Moot, as the Defendants Will Not Seek Fees Under the Statute.

"Federal courts may review only actual cases or controversies, U.S. Const. art. III, § 2, cl.1, and thus 'have no power to adjudicate disputes which are moot.'" *Witzke v. Brewer,* — F.3d —, No. 15-2437, 2017 WL 694497, at *1 (6th Cir. Feb. 22, 2017) (quoting *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc)). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663, 669 (2016), *as revised* (Feb. 9, 2016) (internal quotation marks omitted). A case becomes moot, "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* (quoting *Knox v. Service Employees*, 132 S. Ct. 2277, 2287 (2012)).

Defendants Rogers and Knox County have stated that they will not seek an award of attorneys' fees under the statute. (Doc. No. 12, at 3; see Doc. No. 13, at 1.)[1] Based on these statements, which the Court is entitled to consider under a factual attack to its subject-matter jurisdiction under Rule 12(b)(1),[2] Plaintiff faces no risk that attorneys' fees will be imposed if Rogers is the prevailing party on any of Plaintiff's claims. Thus, Plaintiff has no concrete interest in the outcome of the constitutional challenge to Tenn. Code Ann. § 29-20-113. Accordingly, Plaintiff's constitutional challenge to Tenn. Code Ann. § 29-20-113 is moot, and the Court should dismiss it because there is no subject-matter jurisdiction under Rule 12(b)(1).

II. The Declaratory-Judgment Claims Are Not Ripe for Review, and Plaintiff Lacks Standing to Assert Them.

Plaintiff has no standing, and her constitutional claims are not ripe for review. As Plaintiff's underlying claims have not yet been adjudicated, Defendant Rogers is not yet a "prevailing party" entitled to attorneys' fees under the statute. "When the injury alleged is not actual but merely threatened, standing and ripeness" "unquestionably . . . overlap." *Airline Professionals Ass'n of Int'l Bhd. of Teamsters, Local Union No. 1224, AFL-CIO v. Airborne, Inc.*, 332 F.3d 983, 988 (6th Cir. 2003).

To demonstrate standing to pursue a claim in federal court, a plaintiff must show "three elements: (1) that he has suffered an 'injury in fact,' (2) that there is a 'causal connection between the injury and the conduct complained of,' and (3) that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Kiser v. Reitz,* 765 F.3d 601, 607 (6th Cir. 2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). "Although most federal claims assert allegations that the plaintiff has suffered a past injury, '[a]n allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.'" *Id* at 607–08 (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014)). Here, Plaintiff has not yet suffered an injury, and cannot establish a substantial risk of harm. Accordingly, the court should dismiss the declaratory-judgment claims based on Plaintiff's lack of standing. *See Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 295 (6th Cir. 1997) (affirming dismissal of declaratory judgment action under Fed. R. Civ. P. 12(b)(1) for certain plaintiffs who lacked standing and for whom the suit was not ripe for adjudication); *Goleta Nat'l Bank v. O'Donnell*, 239 F. Supp. 2d 745, 761 (S.D. Ohio 2002) (granting Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction based on plaintiff's lack of standing to bring declaratory-judgment action).

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[1] The statements are contained in the Defendants' motions to dismiss, which are both signed by the Knox County Deputy Law Director. (Doc. 12, at 8; Doc. 13, at 9); *see* Doc. 12, at 7 (stating that "Knox County is providing a defense for Defendant Rogers").

[2] *See In re Stephenson*, 205 B.R. 52, 55 n. 2 (Bankr. E.D. Pa.1997) (statements of counsel not evidence, but may be binding judicial admissions); *DeJager Const., Inc. v. Schleininger*, 1996 WL 73168, *8 (W.D. Mich. Mar. 13, 1996) (statements of counsel are "binding as stipulations or concessions if made in open court or in writing").

Plaintiff's declaratory-judgment claims are not ripe for review. The Declaratory Judgment Act authorizes federal courts, "[i]n a case of actual controversy within its jurisdiction . . . [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). To determine whether a declaratory-judgment action is ripe for judicial resolution, courts "ask two basic questions: (1) is the claim 'fit[] . . . for judicial decision' in the sense that it arises in a concrete factual context and concerns a dispute that is likely to come to pass? and (2) what is 'the hardship to the parties of withholding court consideration'?" *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (en banc) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). A claim is not "fit" for judicial review if it "depends on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* at 526 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

In *Warshak*, the Sixth Circuit vacated a preliminary injunction entered by a district court in a declaratory-judgment action that raised a Fourth Amendment challenge to a federal statute authorizing the federal government to require internet service providers to disclose the contents of electronic communications of their customers in certain circumstances, including by way of an *ex parte* order. *Id.* The Court held that the action was not "fit" for judicial review because, "we have no idea whether the government will conduct an *ex parte* search of Warshak's e-mail account in the future and plenty of reason to doubt that it will." *Id.* Here, Plaintiff's declaratory-judgment claims are similarly not "fit" for review, as they depend both upon Plaintiff's losing on the underlying claims against Defendant Rogers and upon Rogers's moving for attorneys' fees under the statute. Both are "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* "The doctrine of ripeness is meant to 'avoid[ ] . . . premature adjudication.'" *Lawrence v. Chabot*, 182 F. App'x 442, 455 (6th Cir. 2006) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967) (alteration in original). As the Sixth Circuit has stated, "[a]nswering difficult legal questions before they arise and before the courts know how they will arise is not the way we typically handle constitutional litigation." *Warshak*, 532 F.3d at 526 (citing *Lujan*, 497 U.S. at 894).

CONCLUSION

For the stated reasons, the State of Tennessee's motion to dismiss Count One of the Complaint should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system:

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